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No. 88-695

IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 1988

CLIVE MILLER, a Member of the
Morongo Band of Mission Indians,

Petitioner,

vs.

MORONGO BAND OF MISSION INDIANS,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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OPPOSITION TO PETITION FOR WRIT
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COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF THE CASE

Respondent, the Morongo Band of Mission Indians ("Band") is in substantial agreement with Petitioner's Statement of the Case, except for Petitioner's description of both the district court's handling of the

dispositive motions and the substance of the district court's decision. Because those matters may materially affect whether the Petition should be granted, the Band has set forth below its own brief account of the district court's proceedings.

When this action was filed, the Band lacked the financial resources to litigate any claim which it may have had to ownership of the deposited funds (CR 67). Moreover, at that time the law governing State taxation of on-Reservation cigarette sales, Tribal sovereign immunity and Tribal gaming activities was in a state of flux. Thus, when the Band was confronted by the conflicting demands of Petitioner and the California State Board of Equalization ("BOE") to funds in its possession, the Band had no real

choice except to file a complaint in the nature of interpleader (CR 67).

Subsequent to the filing of the original complaint, there were substantial changes in both the law and the Band's economic circumstances. Legal uncertainties about State jurisdiction to tax on-Reservation cigarette sales to non-Indians were resolved in Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980) and Chemehuevi Tribe v. California State Board of Equalization, 757 F.2d 1047 (9th Cir. 1985), rev'd in part on other grounds, ____ U.S. ____, 106 S.Ct. 839 (1986). Chemehuevi also confirmed the continuing viability of Tribal sovereign immunity. The application of 25 U.S.C. §81 to Bingo management and similar contracts was established in, inter alia, A.K. Management Co., Inc. v. San Manuel

Band of Mission Indians, 789 F.2d 785 (9th Cir. 1986), and Wisconsin Winnebago Business Committee v. Koberstein, 762 F.2d 613 (6th Cir. 1985). Meanwhile, the Band also had acquired the financial resources necessary to assert and litigate its own claims to the deposited funds (CR 67).

Based upon the Band's changed economic circumstances and the aforementioned developments in the case law, the Band sought and obtained leave to file an amended complaint asserting that enforcement of BOE's levy was barred by the Band's unwaived sovereign immunity; that the purported lease between the Band and Petitioner was null and void for lack of approval by the Secretary of the Interior pursuant to 25 U.S.C. §415, thereby relieving the Band from liability under the lease, and thus that the Band,

rather than BOE or Petitioner, owned and was entitled to the return of the deposited funds.

BOE filed an answer to the amended complaint (CR 80). Petitioner filed an answer (CR 82), and also counterclaimed (CR 83) for rent and attorneys' fees under the purported lease, the reasonable value of the use of his lands, and money damages for "bad faith" and the alleged violation of Petitioner's rights under the Indian Civil Rights Act, 25 U.S.C. §1302(2), (5), and (8).

Contending that the material facts were undisputed, that the Band's unwaived sovereign immunity barred BOE's levy and that the lack of Secretarial approval of either the purported lease between Petitioner or the related agreements for management of the Band's Bingo enterprise rendered those documents null and void,

the Band moved under F.R.Civ.P. 56 for summary judgment on the claims in its amended complaint (CR 84). The Band's motion for summary judgment was based upon the pleadings, a supporting memorandum, exhibits and various other materials (CR 84).

Simultaneously, the Band also moved under F.R.Civ.P. 12b(1), (2) and (6) to dismiss Petitioner's counterclaim on the grounds that the Band's sovereign immunity deprived the district court of jurisdiction over the counterclaim, and that the counterclaim otherwise failed to state a claim upon which relief could be granted (CR 84). The Band's motion to dismiss was not based upon any matters outside of the pleading, nor was reference to any such matter necessary to the determination of the motion.

BOE filed a cross-motion for summary judgment on the amended complaint (CR 97). Petitioner filed a memorandum of points and authorities in opposition to the Band's motions, and a separate declaration in opposition to the Band's motion for summary judgment (CR 92). However, neither BOE nor Petitioner moved for summary judgment on Petitioner's counterclaim. In fact, no party ever moved for summary judgment on Petitioner's counterclaim.

As was its custom, the district court took the Band's and BOE's respective motions under submission without oral argument. At no time prior to the issuance of its ruling did the district court notify the parties of its intention to rule on any motions other than the Band's and BOE's cross-motions for summary judgment on the amended

complaint and the Band's motion to dismiss Petitioner's counterclaim. Most significantly, the district court never informed the parties that it planned to decide the merits of any part of Petitioner's counterclaim, to determine the reasonable value of the use of Petitioner's land, or to grant judgment on the counterclaim.

On March 26, 1987, the district court entered its order on the pending motions (CR 102). The court granted summary judgment in favor of the Band on its claim that it owed Petitioner nothing under the lease because the lease had not been approved by the Secretary of the Interior, denied the Band's motion to dismiss what the court characterized as Petitioner's claim in recoupment for the reasonable value of the use of his land, found as a matter of undisputed and

indisputable fact that the reasonable value of said use was $73,000 per month, entered judgment in favor of Petitioner in the amount of $292,000 and dismissed the action without instructions as to disbursement of the deposited funds.

The Band filed a timely motion for reconsideration and for a stay of judgment pending appeal (CR 104). In its motion for reconsideration, the Band explained that no party had moved for summary judgment, that its motion to dismiss the Petitioner's counterclaim had been confined to the face of the counterclaim, that the district court had not given any notice of its intention to treat the Band's motion to dismiss the counterclaim under F.R.Civ.P. 12(b)(6) as a motion for summary judgment, and that had it been given a chance to do so, the Band could have shown the existence of a

genuine issue of fact concerning the reasonable value of its use of Petitioner's land.

The Band contended that under the foregoing circumstances, and under such cases as Portland Retail Druggists v. Kaiser Foundation, 662 F.2d 641 (9th Cir. 1981), the district court lacked the power to sua sponte enter summary judgment on Petitioner's counterclaim without at least giving the Band the notice required by F.R.Civ.P. 12(b), and the "reasonable" opportunity to respond required by F.R.Civ.P. 56(c), (e) and (f). Id.

After further briefing by the parties (CR 105, CR 107, CR 108, CR 109), and once again without oral argument,[1/]

[1/] The Band specifically requested oral argument (CR 110). The district court never ruled on that request.

the district court denied the Band's motion for reconsideration, but stayed release of the deposited funds pending appeal (CR 111). That order, entered on June 23, 1987, is set forth in the Appendix hereto.

REASONS FOR DENYING THE PETITION

INTRODUCTION

Contrary to Petitioner's statement of reasons for granting the writ, this case does not raise any important issues concerning the rights of an individual American Indian under any federal statute; the Ninth Circuit's construction of 28 U.S.C. §1362 was not inconsistent with any decisions of this Court or of other Circuit Courts; and there is no confusion within the Ninth Circuit or among the several circuits regarding the jurisdictional prerequisites to an

interpleader action filed under F.R.Civ.P. 22.

ARGUMENT

I.

THE DECISION OF THE COURT OF APPEALS DOES NOT INVOLVE IMPORTANT ISSUES OF INDIVIDUAL INDIAN RIGHTS

When this case began in 1983, the jurisdiction of the State of California to impose its cigarette tax on Indian sales of cigarettes to non-Indians was still being litigated, and the continuing viability of Tribal sovereign immunity also was under direct attack by BOE. Subsequent to the filing of this action, however, this Court's decision in Chemehuevi Tribe v. California State Board of Equalization, supra, upheld California's jurisdiction to tax the on-Reservation sale of cigarettes to non-Indians, and left intact the decision of the Court of Appeals reiterating the

continuing viability and broad reach of Tribal sovereign immunity. Thus, the questions of the validity of BOE's claim against Petitioner and its power to seize funds in the Band's possession have been resolved, and no longer merit this Court's consideration.

Although this Court had established long before this action was filed that leases and other agreements involving Indian trust lands are null and void without the approval of the Secretary of the Interior, see, e.g., Bunch v. Cole, 263 U.S. 250 (1923); Sage v. Hamp, 235 U.S. 99 (1914); Miller v. McClain, 249 U.S. 309 (1919); see also, United States v. Emmons, 351 F.2d 603 (9th Cir. 1965); Lawrence v. United States, 381 F.2d 989 (9th Cir. 1967); Bacher v. Patencio, 368 F.2d 1010 (9th Cir. 1966), when this action was filed the question whether 25

U.S.C. §81 applied to the kinds of transactions which had occurred among the Band, Petitioner, and the Band's putative Bingo manager had not received significant judicial scrutiny. Subsequent to the filing of this action, however, several federal appellate decisions definitively established that such transactions are subject to 25 U.S.C. §81 and/or 415, and thus are null and void without the approval of the Secretary of the Interior. See, e.g., Wisconsin Winnebago Business Committee v. Koberstein, supra; A.K. Management Co., Inc. v. San Manuel Band of Indians, supra; see also, United States ex rel. Buxbom v. Naegele Outdoor Advertising Co., 739 F.2d 473 (9th Cir. 1984). Thus, there is no need for this Court to address that issue, either.

To the extent that 25 U.S.C. §410 requires further interpretation by this Court, this case is not the proper occasion for such review. The issue was not addressed at all in the lower courts and, as correctly held by the Ninth Circuit, Petitioner's claim under §410 is a defense to BOE's claim against Petitioner which can only be raised in a State court proceeding by BOE against Petitioner. Moreover, given that the purported lease was and is null and void for lack of Secretarial approval, it is questionable whether such a defense even exists.

Thus, it seems clear that Petitioner owes BOE the sums which were the subject of BOE's levy, the Band's sovereign immunity precludes BOE from enforcing the levy against the Band, and that 25 U.S.C. §410 is inapplicable to

Petitioner's income from the null and void lease. Because there is no need for further consideration of any of these issues, there is no need to grant the writ sought by Petitioner.

II.

THERE IS NO NEED TO INTERPRET THE SCOPE OF 25 U.S.C. §1362 IN THE CIRCUMSTANCES OF THIS CASE

According to the Petition, this case

> raises the important question whether Congress in enacting [28 U.S.C.] §1362 intended to grant an Indian Band . . . greater access to the District Court than the Band would have under [28 U.S.C.] §1331, by expanding its 'arising under' jurisdiction.

Petition, page 9. The Band agrees that the Ninth Circuit interpreted §1362 more narrowly than it could have,[2/] and the Band would like nothing more than to see

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2/ See, e.g., Moe v. Confederated Kootenai and Salish Tribes, 425 U.S. 463 (1976); Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974).

28 U.S.C. §1362 construed in all cases to give Tribes exactly the same access to the district court as is enjoyed by the United States. However, in the context of the case the Ninth Circuit's construction of 28 U.S.C. §1362 clearly was not so far outside the mainstream of the decisions of this Court as to justify review. Indeed, even if the Ninth Circuit's construction or application of 28 U.S.C. §1362 was completely wrong, review would fulfill no useful purpose, because the ultimate outcome of the case would be the same in any event.

The Court of Appeals remanded the case and ordered its dismissal for lack of jurisdiction; therefore, it never reached the merits of the Band's appeal. If the case were to be reinstated, the only conclusion which the Court of Appeals could reach would be that the

district court committed reversible error in sua sponte granting summary judgment on Petitioner's counterclaim in the absence of a motion therefor and without giving the Band prior notice and an opportunity to respond. See, e.g., Celotex Corp. v. Catrett, 477 U.S. ____, 91 L.Ed.2d 265, 106 S.Ct. 2548, 2552-53 (1986).[3/] See also, Schwartzer, "Summary Judgment Under the Federal Rules", 99 F.R.D. 465, 488 (1984); 10A Wright,

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[3/] Although the district court cited Celotex as authority for its action (CR 111), the district court misapplied or misunderstood that decision. Celotex clearly supports the authority of the district court to enter summary judgment against a moving party in the absence of a cross-motion, and also to initiate summary judgment proceedings sua sponte. However, Celotex does not authorize the district court to sua sponte enter summary judgment on a claim in the absence of a motion therefor without giving the parties advance notice of its intention to do so, especially when a party has timely moved to dismiss a counterclaim for lack of jurisdiction.

Miller & Kane, Federal Practice and Procedure (1983) §2725; Portland Retail Druggists v. Kaiser Foundation, supra.

Upon reversing the district court's decision upon the basis of prejudicial procedural errors, the Court of Appeals would have found that the facts material to the resolution of the Band's and BOE's claims were undisputed, and that the Band was entitled to judgment as a matter of law that neither BOE nor Petitioner had any claim to the deposited funds. The Court of Appeals would also have held that Petitioner's counterclaim should be dismissed pursuant to F.R.Civ.P. 12(b)(2) and (6). At worst, the case would have been remanded for the Band to file an answer and proceed to trial on the counterclaim.

The only claim which Petitioner possibly could assert on remand would be

by way of recoupment. Frederick v. United States, 386 F.2d 481 (5th Cir., 1967). Thus, Petitioner could not obtain any affirmative relief against the Band, id., and could not recover any of the deposited funds.4/ In all probability, however, the Court of Appeals would have entered final judgment on the merits, in the absence of any genuine issue of material fact. See, e.g., United States v. McConney, 728 F.2d 1195 (9th Cir., en banc, 1984), cert. den. 469 U.S. 824.

For all of these reasons, review by this Court would be a meaningless exercise, and thus review is unwarranted.

4/ Because the Band sought no recovery of money from Petitioner, there really was no claim for Petitioner to recoup against.

III.

THE NINTH CIRCUIT'S INTERPRETATION OF F.R.CIV.P. 22 DOES NOT CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS

According to Petitioner, the decisions of the Sixth, Eighth, and Ninth Circuits are in such conflict as to the requirement that an interpleader action brought under F.R.Civ.P. 22 also must arise under federal law within the meaning of 28 U.S.C. §1331, that this Court should grant the Petition to resolve that conflict. However, an examination of the cases which Petitioner alleges are in conflict reveals that the cases are entirely consistent, and thus that review is unnecessary.

In St. Louis U. Trust Co. v. Stone, 570 F.2d 833 (8th Cir. 1978), funds had been deposited into escrow in a dispute between the United States and a defendant in a civil action for fraud. The

Internal Revenue Service levied upon the funds to satisfy a lien for unpaid federal taxes, and the escrow holder filed a Rule 22 interpleader action to declare its rights and obligations under the escrow agreement. Noting that "federal tax liens are specifically governed by a detailed federal statutory scheme[,]" and that, "matters directly affecting the nature or operation of such liens are federal questions," the Eighth Circuit held the district court had federal question subject matter jurisdiction; in essence, the Circuit held that a suit involving a federal tax lien per se involves a federal question under 28 U.S.C. §1331.

In Bell & Beckwith v. United States, 766 F.2d 910 (6th Cir. 1985), the Sixth Circuit did not question the Eighth Circuit's holding in Stone, supra, that a

Rule 22 interpleader action must arise under federal law. Rather, the Sixth Circuit explicitly analyzed and endorsed an assumption which was implicit in Stone, i.e., that a Rule 22 interpleader action was analogous to an action for declaratory relief, and thus that a federal question is present if a defendant has a coercive federal claim against the plaintiff. The Sixth Circuit disagreed with Stone only to the extent that the latter held that any dispute involving a federal tax lien per se arises under federal law. The Sixth Circuit proceeded to find a federal claim lacking because the threshold question -- ownership of the funds -- was purely a question of State law, prior resolution of which would eliminate the federal issues.

The Ninth Circuit's decision in this case did not question the principles expressed in either Stone or Bell & Beckwith (or, for that matter, in Northeast Fed. Credit Union v. Neves, 837 F.2d 531 (1st Cir. 1988)). Rather, the decision of the Court of Appeals in this case rested upon those very same jurisdictional principles.

Petitioner's real complaint is not that the Circuits are in conflict about the jurisdictional prerequisites of a Rule 22 interpleader action, but that the Court of Appeals erred in its application of those principles in this case. This claim, too, is incorrect.

The Court of Appeals correctly identified three possible coercive claims in this case: an action by BOE against the Band to enforce the levy; an action by BOE against Petitioner to collect

State taxes; and an action by Petitioner against the Band for breach of the purported lease and collection of rents thereunder. There can be no doubt that the two possible actions by BOE both arose entirely under State law, and thus could not have supported jurisdiction under 28 U.S.C. §1331 under Bell & Beckwith or Stone. See also, Franchise Tax Board v. Construction Laborers Trust, 46 U.S. 1 (1983).

Petitioner's claim against the Band for rent due under the lease is not as patently rooted in State law as the Court of Appeals found, because both the existence of the lease and the relationship and rights of the parties thereunder may depend in substantial measure upon federal law. See, e.g., 25 U.S.C. §§81, 348, 415; 25 C.F.R. Part 162. Nonetheless, Petitioner still could not have

invoked the district court's jurisdiction of a federally-cognizable claim against the Band, because the Band has never consented to either the creation of a cause of action for breach of the purported lease, or an action by Petitioner thereunder. See, e.g., United States v. Testan, 424 U.S. 392 (1976); see also, Chemehuevi Tribe v. California State Board of Equalization, supra.

Petitioner contends that the Court of Appeals overlooked two other potential coercive claims which he could have brought: a claim against a State official in his individual capacity to enjoin enforcement of BOE's levy; and a claim against a Band member in his individual capacity to enjoin the Band from honoring the BOE's levy. However, any action by Petitioner against a State official would have been barred by 28

U.S.C. §1341, Fair Assessment in Real Estate Ass'n. v. McNary, 454 U.S. 100 (1981), and even assuming that the funds in the Band's possession were derived from a lease of trust land, Petitioner never demonstrated the existence of a federal jurisdictional basis for an action against an individual Band member to prevent disposition of the Tribal funds in which individuals have no vested rights. See, e.g., United States v. Jim, 409 U.S. 80 (1972).

For these reasons also, review is unnecessary.

CONCLUSION

For all of the foregoing reasons, the Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

Dated: November 18, 1988.

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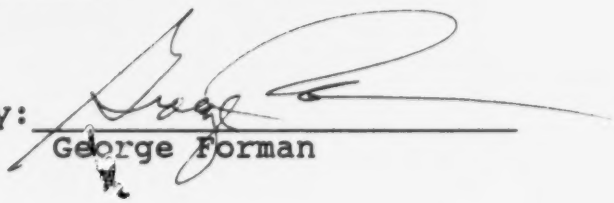
By: 
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APPENDIX A

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MORONGO BAND OF INDIANS and JUSTUS MANAGEMENT COMPANY OF CALIFORNIA, INC., Plaintiffs, v. CALIFORNIA STATE BOARD OF EQUALIZATION, et al., Defendants.	NO. C 83 6190 SC ORDER RE MOTIONS FOR RECONSIDERATION AND STAY (Filed June 22, 1987)

Plaintiff Morongo Band of Mission Indians ("Band") and defendant California State Board of Equalization ("Board") move this court pursuant to Fed. R. Civ. P. 59 for an order reconsidering and/or vacating portions of the court's March 24, 1987 order. The Band claims that the court erred in granting summary judgment on defendant Clive Miller's ("Miller's")

counterclaim. The Band asserts that because Miller did not bring a motion for summary judgment, the Band was denied an adequate opportunity to respond. The Band also claims that the court erred in granting summary judgment in favor of Miller and the Board for the reasonable value of the use of Miller's property. The Band argues that genuine issues of material fact exist as to the reasonable value of Miller's trust allotment. The Board, in its motion for reconsideration, claims that the court erred in declaring the lease between the Band and Miller invalid.

I. Band's motion for reconsideration.

The Band claims that the court erred in granting summary judgment on Miller's counterclaim. The Band asserts that

because Miller did not bring a motion for summary judgment, the Band was denied an adequate opportunity to respond.

The court rejects the Band's argument. Once a party moves for summary judgment, the court may sua sponte grant summary judgment to the non-moving party if the records, files, affidavits, and documents of the case show that there is no genuine dispute of a material fact. Cool Fuel, Inc. v. Connett, 685 F.2d 309, 311 (9th Cir. 1982). Because the Band made a motion for summary judgment, Miller did not need to make a motion for summary judgment. By law, the Band was on notice that the court could sua sponte grant summary judgment to Miller if there were no genuine disputes of material facts.

The Band further claims that the court erred in granting summary judgment in favor of Miller and the Board for the reasonable value of the use of Miller's property. The Band argues that genuine issues of material fact exist as to the reasonable value of Miller's trust allotment.

Even if an express contract is not itself valid, it is evidence of what the parties thought reasonable value to be. Fall Sands Gravel Co. v. Western Concrete, Inc., 270 F.Supp. 495 (D. Mont. 1967). Therefore, the court ruled that even though the lease itself was not valid, its terms indicated what the parties thought was the reasonable value of the use of Miller's trust allotment.

The Band argues that Robert Martin's November 25, 1986 declaration provides

evidence that the terms of the lease were not negotiated, and that therefore, the lease cannot be evidence of the reasonable value of Miller's trust allotment.

The court rejects plaintiff's argument. Martin states that Miller presented the Band with a "take it or leave it" proposition for the Tribal Bingo Enterprise. Martin declaration, Par. 4. Martin does not say, however, that the Band was in any way compelled to "take" Miller's proposition. Instead, Martin's declaration states that Miller wanted the Band to sponsor bingo, because he, as an individual, was unable to. Martin declaration, Par. 3-4. The Band does not allege nor does Martin's declaration suggest that the Band was compelled to accept Miller's offer.

The Band presents no other facts as required by Fed. R. Civ. P., 56(e) supporting its contention that the agreed upon lease amount is not the fair market value of the premises. Therefore, the court finds no reason to change its determination that the rental value stated in the lease is what the parties considered the fair market value of the premises.

Accordingly, the court denies the Band's motion for reconsideration of this court's March 24, 1987 order.

II. Board's motion for reconsideration.

The Board, in its motion for reconsideration, claims that the court erred in declaring the lease between the Band and Miller invalid.

According to Fed. R. Civ. P. 59(e), a motion to alter or amend the judgment shall be served not later than ten days after entry of the judgment. The court entered its order May 24, 1987. The Board filed and served its motion April 14, 1987, more than ten days after entry of the court order. Therefore, the court denies the Board's motion for reconsideration.

In any case, the Board offers no new arguments supporting its motion that the court has not previously rejected.

The Band asks this court to stay final judgment and release of funds pending resolution of the Band's appeal to the Ninth Circuit Court of Appeals. The court grants this request. No supersedeas bond is required.

In accordance with the foregoing, the court orders that:

(1) the Band's motion for reconsideration and vacation of the court's March 24, 1987 order is denied;

(2) the Board's motion for reconsideration of the court's March 24, 1987 order is denied; and

(3) the final judgment and release of funds is stayed pending the resolution of the Band's appeal to the Ninth Circuit Court of Appeals. No supersedeas bond is required.

Dated: June 19, 1987.

/s/ Samuel Conti
United States District Judge